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14 **IN THE UNITED STATES DISTRICT COURT**
 15 **FOR THE DISTRICT OF ARIZONA**

16 Don ADDINGTON; John BOSTIC;
 17 Mark BURMAN; Afshin IRANPOUR;
 18 Roger VELEZ; Steve WARGOCKI;
 19 Michael J. SOHA; Rodney Albert
 20 BRACKIN; and George MALIGA, on
 21 behalf of themselves and all
 22 similarly situated former America
 23 West pilots,

24 CASE NO. CV-13-00471-PHX-ROS

25 **FIRST AMENDED COMPLAINT
 26 FOR DECLARATORY
 27 JUDGMENT ON DUTY OF FAIR
 28 REPRESENTATION AND ORDER
 ENJOINING PILOT
 INTEGRATION THAT DOES NOT
 USE THE NICOLAU AWARD
 SENIORITY LIST**

29 *Plaintiffs,*
 30 vs.
 31 US AIRLINE PILOTS ASS'N, an
 32 unincorporated association; and
 33 US AIRWAYS, INC., a Delaware
 34 corporation,

35 *Defendants.*

36 Plaintiffs Don Addington, John Bostic, Mark Burman, Afshin
 37 Iranpour, Roger Velez, Steve Wargocki, Michael J. Soha, Rodney Albert
 38 Brackin, and George Maliga file this complaint to enjoin Defendants from
 39 integrating the pilot operations in a manner that breaches Defendant
 40 USAPA's duty of fair representation.

41 For their Complaint, Plaintiffs allege as follows:

INTRODUCTION AND PARTIES

1. In 2005, US Airways (a bankruptcy debtor) and America West Airlines merged to form a new airline also called US Airways.

2. The pilots on both sides of that merger (the “East Pilots” from US Airways and the “West Pilots” from America West) agreed to an arbitrated merger of their separate seniority lists.

3. That arbitration was conducted by George Nicolau and an award creating a merged seniority list (the “Nicolau Award”) was announced in May 2007.

4. The East Pilots immediately repudiated their agreement to treat the Nicolau Award as final and binding.

5. In mid 2007, the East Pilots formed a single-airline union, Defendant US Airline Pilots Association (“USAPA”), to oust the multi-airline union that was representing these pilots, the Airline Pilots Association (“ALPA”).

6. At the time, ALPA (which they could not control) was ordering the east Pilots to use the Nicolau Award list.

7. The East Pilots formed USAPA and ousted ALPA because their majority status in the post-merger airline allowed them to control a single-airline union that only represented US Airways pilots.

8. In April 2008, USAPA succeeded ALPA as the bargaining representative.

9. Under East Pilot control, USAPA also repudiated the agreement to honor the Nicolau Award.

10. The West Pilots have been engaged in litigation with USAPA since October 2008 to defend the Nicolau Award.

11. Most recently, USAPA entered into a contract with US Airways that further repudiates USAPA's duty to honor the Nicolau Award.

1 12. This action seeks an order enjoining USAPA from taking any
2 steps to integrate pilot operations that does not implement the seniority
3 order set out in the Nicolau Award.

4 13. Plaintiff Don Addington is a resident of the State of Arizona, who
5 at all times relevant to this Complaint, has been a West Pilot.

6 14. Plaintiff John Bostic is a resident of the State of Arizona, who at
7 all times relevant to this Complaint, has been a West Pilot.

8 15. Plaintiff Mark Burman is a resident of the State of Florida, who
9 at all times relevant to this Complaint, has been a West Pilot.

10 16. Plaintiff Afshin Iranpour is a resident of the State of Arizona,
11 who at all times relevant to this Complaint, has been a West Pilot.

12 17. Plaintiff Roger Velez is a resident of the State of Arizona, who at
13 all times relevant to this Complaint, has been a West Pilot.

14 18. Plaintiff Steve Wargocki is a resident of the State of Arizona,
15 who at all times relevant to this Complaint, has been a West Pilot.

16 19. Plaintiff Michael J. Soha is a resident of Washington State, who
17 at all times relevant to this Complaint, has been a West Pilot.

18 20. Plaintiff Rodney Albert Brackin is a resident of Arizona, who at
19 all times relevant to this Complaint, has been a West Pilot.

20 21. Plaintiff George Maliga is a resident of Arizona, who at all times
21 relevant to this Complaint, has been a West Pilot.

22 22. Defendant USAPA is an unincorporated association with a
23 principal place of business in Charlotte, North Carolina.

24 23. Defendant US Airways, Inc., is a Delaware corporation having
25 its principal place of business in Tempe, Arizona.

26 24. The Allied Pilots Association (“APA”) is an unincorporated
27 association with a principal place of business in Fort Worth, Texas.

28 25. APA is not named as a defendant.

1 26. AMR Corporation (“AMR”), a Delaware corporation with a
 2 principal place of business in Fort Worth, Texas, is currently a Chapter
 3 11 debtor.

4 27. AMR is not named as a defendant.

5 **JURISDICTION AND VENUE**

6 28. This Complaint asserts a claim arising under the Railway Labor
 7 Act, 45 U.S.C. § 151, *et seq.*, and seeks declaratory judgment pursuant
 8 to 28 U.S.C. § 2801, and injunctive relief pursuant to Federal Rule of
 9 Civil Procedure 65(b).

10 29. This Court has original federal question jurisdiction over the
 11 claim against Defendants USAPA and US Airways pursuant to 28 U.S.C.
 12 § 1331 and 49 U.S.C. § 42112.

13 30. Venue is proper in the District of Arizona, pursuant to 28 U.S.C.
 14 § 1391(b), because:

- 15 a) A substantial part of the events or omissions giving rise to
 16 the claims occurred in that judicial district; or were
 17 directed at affecting one or more Plaintiffs residing in that
 18 district; and/or
- 19 b) The principal place of business of Defendant US Airways is
 20 situated in that judicial district.

21 31. Any requirement to exhaust intra-union hearing procedures is
 22 satisfied because internal union remedies here are inadequate or illusory
 23 and because exhaustion would be futile due to USAPA’s consistent
 24 position in opposition to Plaintiffs.

25 32. This action became ripe on or about February 13, 2013, when
 26 USAPA, APA, US Airways and AMR entered into the *Memorandum of*
 27 *Understanding Regarding Contingent Collective Bargaining Agreement* in
 28

1 which USAPA dishonors the Nicolau Award without any legitimate union
 2 purpose for doing so, in breach of its duty of fair representation.

3 **FACTUAL ALLEGATIONS**

4 33. In May 2005, the former US Airways was in Chapter 11
 5 bankruptcy for the second time in two years.

6 34. The US Airways reorganization plan called for it to merge with
 7 America West to form a new airline that would also be known as US
 8 Airways, pursuant to a contract referred to as the "Transition
 9 Agreement."

10 35. At the time of the merger, there were significant differences
 11 between the two airlines and their pilot groups.

12 36. US Airways was a larger airline; including pilots on furlough,
 13 East Pilots outnumbered West Pilots, approximately 5,100 to 1,900.

14 37. All of the West Pilots were active (had flying jobs).

15 38. In contrast, approximately 1,700 of the East Pilots were on
 16 furlough.

17 39. At the time of the merger, the Air Line Pilots Association
 18 ("ALPA") represented both pilot groups.

19 40. Under ALPA governance, each pilot group was represented by a
 20 Master Executive Council ("MEC").

21 41. The chairmen of each ALPA MEC signed the Transition
 22 Agreement on behalf of their pilot groups.

23 42. The Transition Agreement provided, among other things, that
 24 the pilot groups would create a single integrated seniority list according
 25 to defined procedures set out in detail in the ALPA constitution and
 26 called "ALPA Merger Policy."

27
 28

1 43. Pursuant to ALPA Merger Policy, the single integrated seniority
 2 list would be created by two Merger Committees, appointed by each MEC
 3 and representing the pilot group governed by that MEC.

4 44. Under ALPA Merger Policy, if the Merger Committees cannot
 5 negotiate or mediate seniority integration they proceed to arbitration.

6 45. The purpose of such arbitration is to determine a “final and
 7 binding,” “fair and equitable” seniority integration.

8 46. The two pilots groups, East and West, proceeded into
 9 arbitration.

10 47. The East Merger Committee argued in the arbitration that the
 11 East Pilots on furlough at the time of the merger were entitled to
 12 seniority rights based upon their dates of hire at US Airways, even if that
 13 would put hundreds of them ahead of West Pilots who were not on
 14 furlough.

15 48. The West Merger Committee argued that West Pilots who had
 16 been active at the time of the merger should be placed ahead of East
 17 Pilots who were on furlough at the time of the merger.

18 49. Subject to predefined conditions that protected its economic
 19 interests, US Airways agreed in advance to accept the outcome of the
 20 arbitration as the final resolution of this seniority integration dispute.

21 50. Mr. Nicolau issued his decision on May 1, 2007, in a document
 22 referred to as the Nicolau Award.

23 51. Mr. Nicolau rejected the date-of-hire integration advocated by
 24 the east Pilots because “merging active pilots with furloughes, despite
 25 the length of service of some of the latter, is not at all fair or equitable
 26 under any of the stated criteria.”

27 52. The Nicolau Award created an integrated seniority list that
 28 placed approximately 500 of the most senior East Pilots at the top of the

1 list because they flew wide-body aircraft and no West Pilot flew such
 2 aircraft.

3 53. At the other end, the Nicolau Award placed all East Pilots who
 4 were on furlough when the airlines merged at the bottom of the list
 5 because they did not bring jobs to the merger.

6 54. The Nicolau Award blended the remainder of the two pilot lists.

7 55. On December 20, 2007, the Airline accepted the Nicolau Award
 8 integrated seniority list.

9 56. The East MEC appealed to ALPA's Executive Committee to
 10 overturn the Nicolau Award.

11 57. ALPA's Executive Committee ordered the East Pilots to
 12 implement the Nicolau Award.

13 58. In May 2007, East Pilot Stephen Bradford began to plan to
 14 create a new union (USAPA) to oust ALPA.

15 59. Upon information and belief, Mr. Bradford envisioned that East
 16 Pilots would control USAPA because they were in the majority.

17 60. Upon information and belief, Mr. Bradford reasoned that
 18 USAPA, unlike ALPA, would "protect" East Pilot interests over those of
 19 the West Pilots.

20 61. A representation election between USAPA and ALPA was held in
 21 early 2008.

22 62. USAPA won the election and began to represent a bargaining
 23 unit comprised of both pilot groups on April 18, 2008.

24 63. Later in 2008, USAPA presented, and to this day has not
 25 withdrawn, a date-of-hire seniority proposal to US Airways—a proposal
 26 that would put hundreds of West Pilots below the East pilots who were
 27 on furlough at the time of the merger.

28

1 64. USAPA consistently expresses that it has no intention to ever
 2 consider implementing the Nicolau Award list.

3 65. On September 4, 2008, six West Pilots filed an action in the
 4 District of Arizona, alleging that USAPA breached the duty of fair
 5 representation (“DFR”) by refusing to implement the Nicolau Award list
 6 for improper reasons.

7 66. After a 10-day trial, a jury found that USAPA breached the DFR
 8 because its sole reason to frustrate implementation of the Nicolau Award
 9 was to benefit East Pilots, rather than to benefit the bargaining union as
 10 a whole.

11 67. The District Court (Judge Wake) ruled: “The West Pilots remain
 12 entitled to a union that will not abrogate the Nicolau Award without a
 13 legitimate purpose. Any waiver of that right must be consensual.”

14 68. The District Court permanently enjoined and ordered USAPA to:

- 15 a) Make all reasonable efforts to negotiate and implement a
 16 single CBA that will implement the Nicolau Award seniority
 17 proposal;
- 18 b) Make all reasonable efforts to support and defend the
 19 Nicolau Award in negotiations with US Airways; and
- 20 c) Not negotiate for separate collective bargaining agreements
 21 for the separate pilot groups.

22 69. The Ninth Circuit vacated the District Court order on the basis
 23 that the dispute was not ripe.

24 70. Notwithstanding finding lack of ripeness, the Ninth Circuit
 25 cautioned USAPA that unless it “bargain[ed] in good faith pursuant to its
 26 DFR, with the interests of all members—both East and West—in mind,”
 27 there would be “an unquestionably ripe DFR suit, once a contract is
 28 ratified.”

1 71. On Jul 27, 2010, US Airways filed a declaratory judgment
 2 action, claiming that it required guidance, *inter alia*, as to whether it
 3 would be liable if it entered into a collective bargaining agreement with
 4 USAPA that did not implement the Nicolau Award.

5 72. The District Court (Judge Silver) certified a class with these
 6 Plaintiffs as class representatives.

7 73. The District Court found that the Ninth Circuit's ripeness ruling
 8 constrained it from providing US Airways full guidance, stating that
 9 “[p]ursuant to the Ninth Circuit's decision, any claim for breach of the
 10 duty of fair representation will not be ripe until a collective bargaining
 11 agreement is finalized.”

12 74. Nonetheless, the District Court provided important guidance by
 13 ruling that USAPA's date-of-hire “seniority proposal” would “breach its
 14 duty of fair representation” unless it were “supported by a legitimate
 15 union purpose.”

16 75. The District Court provided additional guidance with the
 17 following rulings:

- 18 a) “[D]ecertification of ALPA and the certification of USAPA did
 19 not change the binding nature of the Transition
 20 Agreement”;
- 21 b) “Discarding the Nicolau Award places USAPA on dangerous
 22 ground”; and
- 23 c) “When the collective bargaining agreement is finalized
 24 individuals will be able to determine whether USAPA's
 25 abandonment of the Nicolau Award was permissible, *i.e.*,
 26 supported by a legitimate union purpose.”

27 76. USAPA did not appeal.

28 77. AMR filed a Chapter 11 petition on November 29, 2011.

1 78. On or about February 14, 2013, the two Defendants, APA and
2 AMR entered into the *Memorandum of Understanding Regarding*
3 *Contingent Collective Bargaining Agreement* (the “MOU”) that set the stage
4 for a merger between US Airways and AMR.

5 79. The MOU was ratified by 75% of USAPA's membership on
6 February 8, 2013.

7 80. The MOU provides substantially improved wages to the East
8 Pilots.

9 81. The MOU provides that seniority integration between pilots of
10 US Airways and American will be done according to the McCaskill-Bond
11 Amendment to the Federal Aviation Act.

12 82. The MOU does not address the Nicolau Award or any aspect of
13 East-West seniority integration.

14 83. Remaining aspects of the pilot collective bargaining agreement
15 that will be used in the merger will be determined and implemented
16 without requiring approval by USAPA or additional ratification by its
17 members.

18 84. Upon information and belief, USAPA considers itself absolutely
19 bound to repudiate the Nicolau Award by its constitutional date-of-hire
20 agenda.

CLASS ACTION ALLEGATIONS

22 85. Plaintiffs bring this action, pursuant to Rule 23 of the Federal
23 Rules of Civil Procedure, on their own behalf and on behalf of the West
24 Pilot Class of all persons similarly situated.

25 86. The West Pilot Class is defined as: All pilots who are on the
26 America West seniority list currently incorporated into the West CBA.

1 87. Because the West Pilot Class has approximately 1600 members,
2 the class is so numerous that joinder of all such persons is
3 impracticable.

4 88. There exist common questions of law and fact affecting the
5 members of the putative West Pilot Class.

6 89. The standing of the named Plaintiffs to enjoy and protect the
7 seniority rights established by the Nicolau Award arise from their status
8 as West Pilots and is, therefore, the same as that for any other West
9 Pilot.

10 90. The named Plaintiffs will fairly and adequately represent the
11 interests of the putative West Pilot Class because:

- 12 a) They have moral and financial support from many West
13 Pilots;
- 14 b) One or more of them will suffer the kind of injuries that
15 will be suffered by other West Pilots if seniority
16 integration is done using USAPA's date-of-hire seniority
17 list;

18 and

- 19 c) They each have a good understanding of the issues
20 underlying this litigation and have demonstrated a
21 willingness to invest the necessary time and efforts to
22 fulfill their duties as representative parties.

23 91. Material questions of law and fact arising from this action are
24 common to the named Plaintiffs and other members of the putative West
25 Pilot Class; these include the following:

- 26 a) Whether the named Plaintiffs and other West Pilots have
27 standing to obtain the relief requested in this action;

- b) Whether the MOU violates USAPA's duty of fair representation;
- c) Whether USAPA and US Airways are subject to injunctive remedy to prevent seniority integration that does not implement the Nicolau Award list; and
- d) Whether under common benefit doctrine USAPA must pay Plaintiffs' reasonable litigation expenses that have been incurred enforcing USAPA's duty of fair representation, including attorneys' fees?

10 92. All West Pilots have the right, under the RLA, to fair union
11 representation.

12 93. All West Pilots have an interest in USAPA adhering to its duty of
13 fair representation by adopting and promoting the arbitrated compromise
14 of a seniority dispute that all had agreed would be final and binding.

15 94. Plaintiffs have retained counsel experienced in class action
16 litigation to prosecute these claims.

17 95. This action merits class action treatment because the factors
18 enumerated herein satisfy the requirements of Rule 23(a) and Rule
19 23(b)(1)(A).

CAUSES OF ACTION

21 | I. Claim One: Breach of the Duty of Fair Representation

22 96. Plaintiffs re-allege each and every allegation set forth above as
23 if fully set forth herein.

24 97. Pursuant to the duty of fair representation, USAPA must have a
25 legitimate union purpose to use anything other than the Nicolau Award
26 list to integrate East Pilots and West Pilots.

1 98. USAPA does not have a legitimate union purpose to use
 2 anything other than the Nicolau Award list to integrate East Pilots and
 3 West Pilots.

4 99. USAPA, therefore, breached the duty of fair representation by
 5 entering into the MOU because the MOU abandons a duty to treat the
 6 Nicolau Award as final and binding.

7 100. Plaintiffs are entitled to a declaratory judgment to that effect
 8 and to other remedy sought below.

9 **II. Claim Two: Breach of Transition Agreement by US Airways**

10 101. Plaintiffs re-allege each and every allegation set forth above as
 11 if fully set forth herein and reallege this Claim, which was dismissed by
 12 the Court [Doc. 122], solely to preserve their rights to appeal that ruling.

13 102. The Transition Agreement had an implied covenant of good
 14 faith and fair dealing.

15 103. The Transition Agreement envisioned a “Single Agreement” that
 16 would be made by US Airways and USAPA that would replace material
 17 terms in the separate contracts governing the employment of the West
 18 Pilots (the West CBA) and the East Pilots (the east CBA).

19 104. That implied covenant constrained the terms of the Single
 20 Agreement such that it could not provide materially improved wages for
 21 US Airways pilots (East and West) without also providing terms needed to
 22 integrate pilot operations consistent with the Transition Agreement.

23 105. The MOU is a single agreement that provides materially
 24 improved wages for US Airways pilots (East and West).

25 106. The MOU fails to provide terms needed to integrate pilot
 26 operations.

27

28

1 107. The Transition Agreement requires that pilot seniority will be
 2 implemented using to the integrated seniority list created according to
 3 ALPA Merger Policy and accepted by US Airways – the Nicolau Award list.

4 108. The MOU fails to provide that pilot seniority will be
 5 implemented using the Nicolau Award list.

6 109. Based on the forgoing, adopting the MOU is a breach of the
 7 Transition Agreement implied covenant.

8 110. Despite vigorous protests by the West Pilots, USAPA refuses to
 9 assert breach of the Transition Agreement implied covenant.

10 111. This Court, consequently, has hybrid jurisdiction to hear this
 11 implied covenant claim that would otherwise be a minor dispute subject
 12 to system board arbitration.

13 112. Plaintiffs are entitled to a declaratory judgment that the MOU is
 14 a breach of the Transition Agreement implied covenant by US Airways.

15 **III. Claim Three: Attorneys' Fees**

16 113. Plaintiffs re-allege each and every allegation set forth above as
 17 if fully set forth herein.

18 114. USAPA has several million dollars in reserve collected as dues
 19 and agency fees from all US Airways Pilots.

20 115. Plaintiffs brought this action and the 2008 action and appeared
 21 as defendants in the 2010 action to vindicate the right of all US Airways
 22 pilots to fair representation by USAPA.

23 116. By obtaining the rulings in the 2008 and 2010 actions and by
 24 prevailing in this action, Plaintiffs conferred a substantial benefit on all
 25 US Airways Pilots.

26 117. Under common benefit doctrine, the expenses of achieving
 27 those benefits should, in all fairness, be spread among all those who so
 28 benefitted.

1 118. The expenses of achieving those benefits would be fairly spread
 2 among all US Airways Pilots if paid by USAPA

3 119. The Court should, therefore, make an award in favor of
 4 Plaintiffs and against USAPA for all reasonable litigation expenses,
 5 including attorneys' fees incurred bringing this action, incurred by
 6 Plaintiffs in the actions noted above.

7 **IV. Claim Four: Declaratory Claim**

8 120. Plaintiffs re-allege each and every allegation set forth above as
 9 if fully set forth herein.

10 121. McCaskill-Bond provides that employees affected by an airline
 11 merger have the right to a fair and equitable seniority integration.

12 122. The West Pilots are employees affected by the US Airways-
 13 American Airlines merger.

14 123. In the process of obtaining a fair and equitable seniority
 15 integration of the US Airways and American Airlines pilots that will
 16 commence soon after AMR's Petition of Reorganization is approved and
 17 final (hereinafter the "MOU Seniority Integration"), which is expected to
 18 occur within approximately the next two months, USAPA and its
 19 representatives and counsel are bound by USAPA's constitution to
 20 advance a date-of-hire seniority order for US Airways pilots.

21 124. The West Pilots have an interest to see proper implementation
 22 of the Nicolau Award seniority list in the course of the MOU Seniority
 23 Integration.

24 125. USAPA and its representatives and counsel have an unwaivable
 25 conflict of interest with the West Pilots in regard to seniority integration.

26 126. USAPA and its representatives and counsel, therefore, cannot
 27 fairly represent the West Pilot's interests in the course of the MOU
 28 Seniority Integration.

1 127. The West Pilots contend that they have the right to fully
2 participate in each phase of the MOU Seniority Integration process. (Doc.
3 97 at 5:23 to 5:25.)

4 128. US Airways also contends that the West Pilots have the right to
5 participate fully (with counsel of their own choice) in the MOU Seniority
6 Integration process and that such participation will promote a more
7 effective process. (Doc. 98 at 1:6 to 1:10.)

8 129. USAPA contends that the West Pilots have no legitimate right to
9 participate in any phase of the Airways-American McCaskill-Bond
10 process. (Doc. 95 at 10:17 to 11:6.)

11 130. There is a substantial controversy, therefore, between the West
12 Pilots and USAPA as to whether the West Pilots have a right to
13 participate in the MOU Seniority Integration process.

14 131. Consequently, there is a substantial controversy, between
15 parties having adverse legal interests, of sufficient immediacy and reality
16 to warrant the issuance of a declaratory judgment.

17 132. The West Pilots are entitled, pursuant to 28 U.S.C. § 2201, to
18 an order declaring that they have party status and the right (but not the
19 obligation) to participate fully (with counsel of their own choice) in the
20 MOU Seniority Integration process.

21 **V. Prayer for Relief**

22 Plaintiffs respectfully ask the Court for the following relief:

23 133. Judgment that USAPA violated the duty of fair representation
24 by, among other things, entering into a contract, the MOU, that provided
25 substantially better wages for East Pilots without requiring their
26 agreement to implement the Nicolau Award list;

27

28

134. Judgment that USAPA is continuing to violate the duty of fair representation by insisting that it will use a date-of-hire seniority list rather than the Nicolau Award list;

135. Judgment that US Airways, with the consent of USAPA, is in breach of the implied covenant of the Transition Agreement;

136. An injunction requiring Defendants to conduct seniority integration according to the MOU procedures but using the seniority order in the Nicolau Award list to order the US Airways pilots;

9 137. Judgment that the West Pilots are entitled to an order declaring
10 that they have party status and the right (but not the obligation) to
11 participate fully (with counsel of their own choice) in the MOU Seniority
12 Integration process; and

13 138. Judgment awarding Plaintiffs the reasonable litigation
14 expenses, including attorneys fees, incurred since 2008 protecting the
15 fair representation rights of the US Airways Pilots.

16 Dated this 2nd day of August, 2013.

POLSINELLI PC

By /s/ *Jennifer J. Axel*

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CERTIFICATE OF SERVICE

I hereby certify that on this 2nd day of August 2013, I electronically transmitted the foregoing document to the U.S. District Court Clerk's Office by using the ECF System for filing and transmittal.

By /s/Jennifer J. Axel